

STATE OF MONTANA  
DEPARTMENT OF LABOR AND INDUSTRY  
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNIT CLARIFICATION NO. 2-97:

YELLOWSTONE COUNTY,	)	
STATE OF MONTANA	)	
	)	
Petitioner,	)	
	)	
vs.	)	<b>FINDINGS OF FACT;</b>
	)	<b>CONCLUSIONS OF LAW;</b>
	)	<b>AND RECOMMENDED ORDER</b>
MONTANA PUBLIC EMPLOYEES	)	
ASSOCIATION (MPEA),	)	
	)	
Respondent.	)	

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**I. INTRODUCTION**

On September 9, 1996, Petitioner Yellowstone County, Montana, submitted a Petition for Unit Clarification requesting that four positions within the Yellowstone County Courthouse Bargaining Unit ("Bargaining Unit") be excluded from that unit because of their supervisory responsibilities. The positions requested to be excluded from the Unit are as follow:

Yellowstone County Treasure's Office

Jeanne Vladic, Cash Management Supervisor

Judy Horton, Tax Supervisor

Yellowstone County Sheriff's Department

Suzanne Dupuis-Brown, Civil Division Supervisor

Carla Bracken, Records Division Supervisor

On October 9, 1996, the Respondent MPEA (Respondent) filed an answer to the petition denying that the four positions should be excluded due to their supervisory responsibilities. On October 17, 1996, this case was transferred to the Hearings Bureau for a contested case hearing. Pre-

hearing negotiations did not dispose of the supervisory issue concerning the four positions. After several continuances stipulated between the parties, an in-person hearing was conducted in Billings, Montana on April 24, 1997 by Gordon D. Bruce, Hearings Officer. The Petitioner presented six witnesses who gave sworn testimony: Jay Bell, Yellowstone County Undersheriff; Suzanne DuPuis-Brown Civil Division Supervisor; Carla Bracken, Records Division Supervisor; Jeanne Vladic, Cash Management Supervisor; Judy Horton, Tax Supervisor and Cindy Sellers, Yellowstone County Treasurer.

Joint Exhibits J-1 through J-17 were admitted into the record without objection. Additionally, the organizational charts of the Yellowstone County Treasurer's Department and the Yellowstone County Sheriff's Department were used as demonstrative exhibits and these organizational charts are appended to the Petition for Unit Clarification (Exhibit J-1).

Parties submitted post-hearing briefs, and the record was deemed closed on June 6, 1997.

## **II. FINDING OF FACTS<sup>1</sup>**

1. Jay Bell, Yellowstone County Undersheriff, ("Bell") has been with the Yellowstone County Sheriff's Department ("Department") for over twenty

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<sup>1</sup> All proposed findings, conclusions and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the findings, conclusions and views stated herein, they have been accepted, and to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings, conclusions and arguments may have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings herein, it is not credited.

years and presently is second in command under Sheriff Charles Maxwell. Bell revealed that a 1996 reorganization of the Department transferred a previous lieutenant deputy sheriff, who was the supervisor of the Civil Division within the Department, to other duties. (Testimony of Bell)

2. In July 1996, *Suzanne Dupuis-Brown* ("Brown") was promoted to Civil Division Supervisor. Brown has worked in numerous capacities with the Sheriff's Department. She has spent eleven years in the Civil Division. Presently Brown supervises three individuals within the Civil Division who are members of the Bargaining Unit. (Testimony of Bell)

3. Brown is responsible for the overall performance of the Civil Division. She conducts interviews for new positions. She is responsible for new and continuous training for new and established employees and is solely responsible for maintaining and completing annual job performance evaluations, signing them as Civil Division Supervisor. Additionally, she is solely responsible for arranging the various work schedules for the three employees within the Civil Division; solely responsible for approving vacation and sick leave and solely responsible for preparing the Civil Division's budget for the sheriff. (Testimony of Bell)

4. Brown exercises substantial discretion and independent judgment in her responsibilities as supervisor. Her recommendations concerning hiring or firing are an essential part of those responsibilities. Further, she is authorized to submit oral or written warnings or reprimands to Civil Division employees without prior notification or approval from Bell. (Testimony of Bell)

5. Brown is well-known within the Sheriff's Department for her expertise in Civil Division matters. The Department relies upon her heavily for training and direction of that division. She is currently

performing not only all the duties of the Civil Division supervisor, but also additional expanded duties. (Testimony of Bell)

6. Brown's numerous supervisory responsibilities include training of new employees; evaluating job performance and attendance; assigning work responsibility; sole responsibility for discipline with the exception of suspension or termination (which is the Sheriff's duty); responsibility for making recommendations concerning promotions and hiring, and responsibility for the overall performance of the Civil Division. (Testimony of Brown)

7. Brown is solely responsible for preparing and maintaining the Civil Division budget. She devotes approximately one hour each morning to scheduling the various duties of the day for the three employees of the Civil Division concerning their work assignments and also their vacation and sick leave records. She has attended two supervisor training seminars during the past year. (Testimony of Brown)

8. Brown provides guidance and training to the three employees within the Civil Division, and also to deputies within the Sheriff's Department concerning all civil matters performed by the Department. Prior to her promotion, she had neither that authority nor the authority to discipline employees. (Testimony of Brown)

9. According to her job description, she is responsible for the management and supervision of the Sheriff's Department's civil operations section. Included within this job classification are training, scheduling, organizing, directing, supervising, and coordinating all activities of the Civil Division. (Exhibit J-13)

10. Because she supervises other Civil Division employees, she wants to be excluded from the Bargaining Unit. (Testimony of Brown)

11. *Carla Bracken* ("Bracken") is an eight-year employee of the Department. She is presently the Records Division Supervisor and supervises eight individuals employed by the Sheriff's Office within the Records Division. She supervises a warrants clerk, a records clerk and six complaint clerks. (Testimony of Bell and Exhibit J-1)

12. Bracken recently completed computerized record retrieval training for a new computer system utilized by the Department. She is presently responsible for training all new employees within the Records Division. She is also involved in the interview process of each new employee. Similar to Brown, Bracken has sole responsibility for maintaining, evaluating and presenting the Records Division budget to the Yellowstone County Sheriff. (Testimony of Bell and Exhibit J-16)

13. Bracken's uncontroverted testimony shows she also is solely responsible for interviewing, and for making hiring and firing recommendations to Undersheriff Bell or Sheriff Maxwell. She independently designed and implemented the Records Division interview format and questions. She is solely responsible for training all new employees, for continuously training of current employees (particularly as to Sheriff's Department policy and procedure), and for managing the computerized state, local and national record systems essential to operation of the Sheriff's Department. (Testimony of Bracken)

14. Bracken is also responsible for completing employee performance evaluations for Records Division employees. She signs each evaluation as supervisor. She gives assignments to the eight Records Division employees. She has the authority to make oral or written reprimands or warnings without previous approval from Undersheriff Bell or Sheriff Maxwell. She is responsible for the overall performance of the Records

Division. If there is deficient performance in any category of that division, she is the person to whom the sheriff or undersheriff speaks. (Testimony of Bracken)

15. Bracken's job description indicates that she has wide discretion, performing her supervisory duties with independent judgment. She is responsible for planning, organizing, scheduling, assigning and supervising the eight employees within the Records Division, for providing performance evaluations, and for making effective recommendations concerning hiring or terminating individuals. (Exhibit J-16)

16. Bracken wants to be excluded from the Courthouse Bargaining Unit. (Testimony of Bracken)

17. Bell has very infrequent contact with either Brown or Bracken, and often does not speak with them concerning their supervisory duties for several days at a time. Both supervisors are much more knowledgeable and conversant within their respective Division than Bell. (Testimony of Bell)

18. Employees within the Civil Operations and Records Division have been told that Brown and Bracken are their supervisors. Both Brown and Bracken have long-term experience in the Sheriff's Department. They discharge their supervisory responsibilities with a large degree of independent judgment, which is expected and encouraged by the Sheriff. (Testimony of Bell)

19. *Cindy Sellers* ("Sellers") is the Treasurer of Yellowstone County and that office contains twenty-three employees. Twenty-one of these employees are members of the Courthouse Bargaining Unit, two are not. Three employees are currently performing supervisory responsibilities: Marty Pryor ("Pryor"), Motor Vehicle Supervisor, Jeanne

Vladic, Cash Management Supervisor, and Judy Horton, Tax Supervisor.

(Testimony of Sellers and Exhibit J-1)

20. Pryor supervises fourteen employees and has been the Motor Vehicle Division Supervisor for approximately three years. Jeanne Vladic ("Vladic") is the Cash Management Supervisor and supervises four employees within Cash Management. She has been the supervisor since 1988 and has been with the Treasurer's Department for approximately twenty-three years. Judy Horton ("Horton") is Tax Supervisor and previously managed three employees. Now two positions have been eliminated and she supervises one employee. Horton has worked in the Treasurer's Office for approximately twenty-two years and has been the Tax Supervisor since 1990. (Testimony of Sellers)

21. Both Horton and Vladic are responsible for training new and established employees. Both are integral, essential members of the interviewing committee for new employees. Both Sellers and one of the supervisors maintain identical score cards during new employee interviews. They discuss and decide hiring based upon equal input and scoring from both Sellers and the applicable supervisor. (Testimony of Sellers)

22. Both Horton and Vladic are solely responsible for annual job performance evaluations and sign the evaluations as respective supervisors. They have authority to discipline employees through written or verbal warnings or reprimands without prior approval from Sellers. (Testimony of Sellers)

23. Both Vladic and Horton are responsible for work schedules, vacation and sick leave within their respective divisions. They are responsible for the management and presentation of budgets to the treasurer within their respective divisions. They are responsible for

policy and procedure guidance to other division employees. They direct their respective tax division employees in their daily duties. Each of these two supervisors is solely responsible for the overall performance of her division. (Testimony of Sellers)

24. Sellers periodically schedules supervisory meetings and includes Horton and Vladic in those meetings. Cash management employees and property tax employees are aware that Vladic and Horton are their respective supervisors. When issues arise concerning one of the three divisions, Sellers discusses the matter with the particular supervisor involved--Vladic, Horton or Pryor. Each supervisor is solely responsible for division performance. (Testimony of Sellers)

25. Although Horton, Vladic and Pryor are within the Taxing Division of the Treasurer's Office, only Pryor is excluded from the Bargaining Unit. (Testimony of Sellers)

26. Vladic has been the Cash Management supervisor since 1988 and has been an employee of Yellowstone County in the Treasurer's Office for approximately twenty-three years. She supervises, trains and disciplines the Head Cashier, an Account Clerk I, a Cashier, and an Account Clerk II. Vladic makes independent decisions and judgments for Cash Management and prepares the budget. She provides guidance to all employees on Treasurer's Department policy and procedure, and is solely responsible for the performance of the Cash Management Department. Vladic is responsible for effectuating any changes in procedures or policy due to legislative changes. (Testimony of Vladic)

27. Vladic assigns duties to the four Cash Management employees and administers verbal or written reprimands and warnings without prior approval from the Treasurer. She is solely responsible for job



performance evaluations of the Cash Management employees and signs written evaluations as their supervisor. (Testimony of Vladic)

28. Vladic and Sellers are the sole individuals responsible for hiring and interviewing for positions within Cash Management. Vladic has authority to make effective recommendations concerning hiring and termination and recently made such a recommendation for an employee's promotion to the Treasurer's Office. Subsequently, that employee was promoted pursuant to Vladic's recommendation. (Testimony of Vladic)

29. When Sellers is away from the Treasurer's Office, Vladic is usually in charge of the office during her absence and is empowered to make decisions for the Treasurer. (Testimony of Vladic)

30. The Class Specification for the Cash Management Supervisor (Vladic's position) contains numerous references to planning, organizing, directing, supervising and coordinating all operations and other activities for the Cash Management Department in the Treasurer's Office. Vladic's position has considerable discretion in the exercise of independent judgment and initiative. The supervisor is solely responsible for training, scheduling, and evaluation of employee performance, and for directing the work responsibilities of employees classified as Cashier, Head Cashier, Account Clerk I and Account Clerk II. The supervisor position is also paid a higher salary than that received by subordinates. (Testimony of Vladic and Exhibit J-14))

31. The four employees within Cash Management recognize and view Vladic as their supervisor. She desires to be excluded from the Bargaining Unit due to her supervisory responsibilities and the difficulty of representing the interest of management--the Treasurer--as opposed to the Bargaining Unit. (Testimony of Vladic)

32. Horton is the Tax Supervisor and has held that position since 1990. Previously, she was an assistant to the treasurer. She continues to be responsible for maintaining the work schedule of not only the Tax Department, but also the entire Treasurer's Office since 1981. (Testimony of Horton)

33. Horton originally supervised three employees, but now supervises one delinquent tax clerk ("clerk") due to elimination of two positions within the division. Horton is solely responsible for assigning duties to the clerk, as she did for the previous positions. She continues to submit job performance evaluations for the clerk and signs as supervisor on those pertinent documents. Horton is authorized to issue oral or written reprimands or warnings to the clerk. (Testimony of Horton)

34. Horton is solely responsible for reconciling and collecting property taxes and for her portion of the budget in the Taxing Division. Although she has assumed certain clerical duties since two positions were eliminated, she receives a higher salary than the clerk position remaining under her direct supervision. (Testimony of Horton and Exhibit J-15)

35. Horton is accountable to Sellers if there is a deficiency within her area of responsibility. The Class Specification for Tax Supervisor (Horton's position) contains numerous references to the exercise of independent judgment, planning, organizing, directing, supervising and coordinating the duties of subordinate employees. Horton also works on vacation schedules for the Treasurer's Office. She schedules work and evaluates the work performance of the delinquent tax clerk, and formerly the mobile home and personal property tax clerks.

Horton assigns, prioritizes and supervises work within the Division as required by her job description. (Testimony of Horton and Exhibit J-15)

36. If there is a problem or a recommendation concerning hiring, firing, discipline or promotion within the tax unit, Horton makes recommendations solely to Cindy Seller, Treasurer, and her recommendations are given great weight by the Treasurer. (Testimony of Horton)

37. Horton desires to be excluded from the Bargaining Unit due to potential conflicts arising if she should be required to reprimand or take other adverse action against her assistant. She feels that acting in a supervisory position as a member of the MPEA presents problems in maintaining loyalty to both her employer and the employee she presently supervises. (Testimony of Horton)

### **III. DISCUSSION**

The Board of Personnel Appeals (BOPA) properly uses federal court and National Labor Relations Board (NLRB) precedents as guidelines in interpreting the Montana Collective Bargaining for Public Employees Act; the state Act is similar to the Federal Labor Management Relations Act. *State ex rel. Board of Personnel Appeals v. District Court*, 183 Mont. 223, 598 P.2d 1117, 103 LRRM 2297 (1979); *Teamsters Local No. 45 v. State ex rel. Board of Personnel Appeals*, 195 Mont. 272, 635 P.2d 1310, 110 LRRM 2012 (1981); *City of Great Falls v. Young (Young III)*, 686 P.2d 185, 119 LRRM 2682 (1984).

Section 39-31-103(11), MCA (1995), provides the definition and criteria employed by the State of Montana in determining whether or not a particular employee is "supervisory." This statute is virtually identical to 29 U.S.C. § 152(11), part of the National Labor Relations Act (NLRA). Employees who are supervisors are exempt from both the state and federal

definitions of public employee, primarily as a matter of policy, to improve the peacefulness of labor relations between employers and employees and to allow employers to have the undivided loyalties of these key employees. *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076, 1078 (6th Cir. 1987). Whether an employee is a supervisor depends on the duties performed by that employee for the organization, including one or more of the duties outlined in Section 39-31-103(11), MCA: the power of assignment, reward, suspension, layoff, recall, transfer, determination of wages, discipline, hiring and discharge, responsible direction of subordinate employees, power to **effectively recommend** any of the specifically listed duties and the use of independent judgment which is beyond routine or clerical duties. *Id.* at 1078 (emphasis added). See also, *NLRB V. Health Care and Retirement Corp. of America*, \_\_\_\_ U.S. \_\_\_\_, 114 S. Ct. 1778, 1780 (1994). If an employee has the authority to perform even one of the twelve listed activities with the use of independent judgment, then he or she should be excluded from the Courthouse Bargaining Unit. *NLRB V. Konig*, 79 F.3d 354, 357 (3rd Cir, 1996) citing *Health Care and Retirement Corp.*, *supra*, 114 Supp. CT. 1780; *Manor West, Inc. v. NLRB*, 60 F.3d 1195, 1197 (6th Cir. 1995); *Kaczynski v. Draper Printing*, 848 F. Supp. 1060, 1063 (D. Mass. 1994).

Section 39-31-103(11), MCA, outlines the various statutory powers which define a supervisory employee. The statute is read in the "disjunctive." If the four employees in this matter have the authority to perform even one of the statutory powers, this is sufficient to confer supervisory status and exclude them from the Bargaining Unit so long as independent judgment is used in the performance of one or more of the specifically listed powers.

An individual need not meet all of the criteria listed...in order to qualify as a "supervisor." Indeed, it is well settled that an individual who meets only one of the criteria qualifies as a "supervisor"...

*E and L Transport Co. v. NLRB*, 85 F.3d 1258, 1269 (7th Cir. 1996) citing *NLRB v. Winnebago Television Corp.*, 75 F.3d 1208, 1212 (7th Cir. 1996); *NLRB v. Konig*, *supra*, 79 F.3d at 357-158; *Northeast Utilities Service Corp. v. NLRB*, 35 F.d. 621, 624 (1st Cir 1994); *Manor West, v. NLRB*, *supra*, 60 F.3d. At 1197; *Kaczynski v. Draper Printing*, *supra* at 1063.

Respondent essentially argues that the supervisors spend a "trivial" amount of time in any supervisory capacity. When an employee possesses at least one of the authorities under the supervisory statute, he or she is indeed a supervisor regardless of the frequency within which these responsibilities are exercised. It is well settled that if an individual is shown to exercise supervisory authority, the frequency with which he/she exercises that authority does not negate the necessary conclusion that he/she is a statutory supervisor. *E and L Transport Co. v. NLRB*, *supra*, at 1270; *Northeast Utility Service Corp v. NLRB*, *supra*, at 624.

It is the function of the employee that is critical rather than the label or title. Therefore, it is a question of fact in each individual case as to whether the individuals involved are supervisors. *Kaczynski v. Draper Printing*, *supra*. The exercise of any one of these statutory supervisory criteria must be accomplished with at least some independent judgment and cannot be routine clerical or perfunctory. *Desert Hospital v. NLRB*, 91 F.d. 189, 192-193(D.C. Cir. 1993).

The following considerations for determining supervisory status were recommended by BOPA pursuant to *Billings Firefighters Local 521 v. City of Billings*, UC 1-77:

Whether the employee has independent authority to perform the functions enumerated in the Act.

Whether the exercise of authority in the area of assignment and direction is routine.

Whether the employee uses independent judgment in directing the activities of others.

Whether the recommendations made by the employee are subject to independent review or investigation.

Whether a substantial amount of the employee's time is spent doing work which is similar to the work of the subordinates.

Whether an unrealistic and excessively high ration of supervisors to employees would be created.

BOPA has astutely noted that state government supervisors are subject to greater review than private sector counterparts. They have subjectively less freedom to exercise their authority by the nature of their employment; however, this does not lessen the ultimate authority of the incumbents in their status as a supervisor. The record reflects that they *effectively recommend* concerning key criteria analyzed such as hiring and firing. See, e.g., **Montana Public Employees Association vs. Department of Institutions, UC 9-88 (1989)**. Finally, employees have nevertheless been found to be supervisors, even though restricted by federal guidelines and company policies where they were nevertheless performing at least one of the twelve statutory criteria. *Maine Yankee Atomic Power Co. v. NLRB, supra*, 624 F.2d at 362.

The record reveals that certain categories, such as the following, clearly illustrate the supervisory status of these four County employees. They overwhelmingly satisfy not merely one, but several of the primary statutory criteria, as well as several secondary indicia of supervisory status.

#### **INTERVIEWING/HIRING**

Bracken, Brown, Horton and Vladic are directly and integrally involved in the interviewing and hiring process. They add persuasive input in the final decision concerning hiring within the division. All four uniformly participate in interviewing for positions within their sections and divisions. The ability and authority to make effective recommendations concerning the hiring of a prospective employee is one of the statutory criteria which makes all four of these individuals supervisors.

In *Montana Public Employees Association vs. Department of Institutions*, UC 9-88 (1989), the Board determined that Habilitation Aid III's were supervisors and excluded from the bargaining unit. The Habilitation Aide III's participated in the selection committee and interview process for subordinate employees, although the final decision was made by a facility superintendent. They had the authority to effectively recommend and influence the promotion of subordinates and the granting of other awards. They also had the authority to responsibly direct the work of subordinates.

All of the four Yellowstone County supervisors have been and continue to be instrumental in the interview and hiring process with their Department heads in making the ultimate hiring decision. Employees, who are intimately and crucially involved in the interview and hiring process, are supervisors for that reason alone, since their recommendations required the use of independent judgment and discretion. For example, in *Desert Hospital v. NLRB*, supra, at 193, the D.C. Circuit concluded that although a particular nurse-supervisor did not actually hire employees, she was involved in the initial screening interviews. Such action showed that she was "aligned with management as her hiring and evaluation work was a regular and frequent portion of her responsibilities."

All four employees in this case are relied upon heavily for ultimate recommendations in hiring, and in conducting and formatting the interview process prior to making their recommendations to the Department heads. All four employees meet the requisite criteria and should be excluded.

An employee may be excluded if he has authority over any one of the twelve enumerated personnel actions, including hiring...

*NLRB v. Yeshiva*, 444 U.S. 672, 682, N. 13, 100 S. Ct. 856, 862, N. 13 (1980). The fact that these four employees do not make the ultimate hiring decision does not exclude them from supervisory status under the twelve criteria.

The fact that Hilgendorf may not have executed the decision does not undermine his predominate role in reaching that decision.

*NLRB v. Winnebago Television Corp.*, *supra*, 75 F.3d at 1208.

...The NLRB's argument proves too much. It transforms the effective recommendation requirement of §152(11) into a requirement that a supervisor reach and execute hiring decisions himself....This would exclude from supervisor classifications all but the most senior managerial personnel, for more often than not persons higher up the chain of command sign on the dotted line and execute decisions effectively made by those below...

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To require that a supervisor's opinion always be regarded as scripture by those senior to him within the business organization would turn common sense on its head..., Kowalski's decision to act contrary to Hilgendorf's recommendation in one case does not dilute the significance of Hilgendorf's role in personnel decisions.

*Id.* At 1216. Respondent has failed to present any evidence which contradicts the crucial role these four employees have concerning decisions about interviewing and hiring.

#### **RESPONSIBLE DIRECTION OF AND ASSIGNMENT TO SUBORDINATES**

The authority to make assignments and responsibly direct other employees as they perform those assignments is another criteria met by these four employees. They do not have daily contact with Department heads, and are not required or expected to do so. They each have years of experience and expertise in their respective positions, and prior experience in directing subordinate employees. Both the Treasurer and Sheriff rely upon these four employees to conduct many of their duties



independently. This is another criteria met to exclude all four of these individuals from the Courthouse Bargaining Unit.

Respondent argues that all four employees are merely "lead workers" who perform mundane, ministerial, perfunctory duties which infrequently touch upon the assignment and directions of work concerning less experienced employees. The facts belie any such conclusion. Respondent seems to suggest that both the Sheriff's Office and Treasurer's Office procedures limit the authority of these employees to assign duties to their respective subordinate workers. However, the record reflects that all four supervisors utilize their independent discretion and judgment in making work assignments, and in transferring subordinates to other assignments or positions when necessary.

Government supervisors may be more limited by statutory-mandated and implemented policies and procedures. All four of these employees have the authority to assign or transfer work to their subordinates very similar to that found in UC 9-88, *supra*. In that case, the Board held that the "authority to transfer within her particular area of responsibility is more than routine or clerical." The Board further concluded that if the Habitation Aid III'S were not supervisors, it would leave substantial time during which the considerable number of subordinate employees would work without any supervision. See also, *Schnuck Markets, Inc. v. NLRB*, 961, F.2d 700, 705-706 (8th Cir. 1992). In *Schnuck*, if a night manager was a nonsupervisory, ministerial employee, then a store with a two or three million dollar inventory was without a supervisor for eight hours every day. The Court rejected the NLRB findings and held that the night manager, even though he did not have the authority to hire or fire, did effectively and independently direct subordinates and had authority to

manage, assign, work and admonish employees who were not doing their job. This was sufficient to make this employee a supervisor. *Id.* at 704-705. Similarly in *NLRB v. Beacon Light Christian Nursing Home*, *supra*, at 1079-1080, the Sixth Circuit concluded that those who use independent judgment in responsibly directing the work of others qualified as supervisors, where certain L.P.N.'s instructed subordinate nurse's aides, were their team leaders, assigned patients to the nurse's aides, and were responsible for their work product.

Respondent further argues that because these four workers work alongside their subordinates, they are not. But this does not render them nonsupervisory employees.

Although she works alongside of the other employees in photo archives, Mrs. Morrow assigns and schedules their work, signs their time sheets, approves sick leave and vacation, and ... the two employees under her guidance think of her as a supervisor.

*Montana Historical Society vs. Montana Federation of State Employees*, MFT, AFT, AFL-CIO, UC 5-85 (1986)

A supervisor may perform many of the same functions as a subordinate without leaving the role of supervisor. *Schnuck Markets, Inc. v. NLRB*, *supra*, at 707.

And again, the fact that the supervisors may perform many of the same tasks as their subordinates does not dilute their supervisory responsibilities. *Schnuck Markets, Inc., v. NLRB*, *supra*, 961 F.2d at 706-707 ("The fact that Jennings spent a portion of his time on manual labor is not controlling....Shift managers at a fast food restaurant were found to be supervisors even though they spent 40 to 60 percent of their time as regular counter employees."). *Id.* at 706-707 (citations omitted). See also, *NLRB v. McCullough Environmental Services, Inc.*, 5 F.3d 923, 940-941

(5th Cir. 1993), where the Circuit Court held that although senior operators performed many of the same tasks as lower-ranking personnel, where their duties included, among other things, directing subordinates and "making sure everything is running all right," they were in fact supervisors.

All four employees are responsible for the performance and discharge of their respective division duties. That responsibility is precisely what has excluded employees from the bargaining units in federal cases. See, e.g., *Northeast Utilities Service Corp.*, supra, at 625 citing *Main Yankee Atomic Power Co. v. NLRB*, 624, F.2d 347, 360 (1st Cir. 1980) ("To be responsible is to be answerable for the discharge of a duty or obligation."); *NLRB V. Beacon Light Christian Nursing Home*, supra, at 1079; *NLRB V. KDFW-TV, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986) ("In determining whether direction in any particular case is responsible, the focus is on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs."). Here, it is clear that the four Yellowstone County supervisors also satisfy this criterion.

**AUTHORITY TO DISCIPLINE, EVALUATE AND  
RECOMMEND EXCLUDES THESE FOUR SUPERVISORS  
FROM THE BARGAINING UNIT**

The uncontroverted and unrebutted testimony of these four employees establishes their requisite authority in administering their respective supervisory duties. The responsibility and duty to administer annual, regular job performance evaluations, to administer verbal and written reprimands and warnings, and to make recommendations concerning demotions, promotions, hiring, and terminations are indeed the hallmarks of a supervisor and have been consistently recognized by both the BOPA and

federal case law. *Elliott Coal Mining v. Director, Office of Workers' Compensation*, 17 F.3d 616, 637 (3rd Cir. 1994) ("Supervisors include persons who have the power to make effective recommendations about employee disciplinary measures, not just those who carry them out."); *Desert Hospital v. NLRB*, *supra*, at 193 (Nurse supervisor was excluded from the bargaining unit because she was involved in the screening interviews, was aligned with management as her hiring and evaluation work was a regular and frequent portion of her responsibilities even though reprimands and warnings issued by her were reviewed and investigated independently by her own supervisor.); *E and L Transport Co. v. NLRB*, *supra*, at 1270 (Supervisor issuing cargo damage reprimands held to be a supervisor even though the reprimands were infrequent. Frequency was irrelevant. Exercising authority to discipline fellow employees alone satisfied the statutory criteria.)

In *NLRB v. Beacon Light Christian Nursing Home*, *supra*, at 1079 L.P.N.'s were found to be supervisors even though they did not personally have the power to discharge or promote. They were responsible for evaluation and discipline and the evaluation reports were:

...serious attempts to determine the employee's progress and constituted 'recommending actions' within the meaning of the NLRA. 29 U.S.C. § 152(11)....We reject the Board's focus only on the end results of the L.P.N.'s efforts because it obscured the meaningfulness of the L.P.N.'s disciplinary and evaluative functions.

See also, *NLRB v. Chicago Metallic Corp.*, 794 F.2d 527, 531 (9th Cir. 1986) (written reprimand signed by individual as "company supervisor" together with periodic evaluations, warnings, etc., were sufficient to exclude employee as a supervisor).

The evaluation, discipline and recommendation process are crucial functions of these four employees. This fact alone excludes them from the Bargaining Unit because they exercise such duties with independent judgment without prior approval from the elected Department heads. See U.C. 5-85 where an employee who supervised two others had authority to recommend termination of an employee and was excluded from the Bargaining Unit as a supervisor.

#### **INDEPENDENT JUDGMENT**

These four employees have sole responsibility, together with the elected Department head, to assign work, transfer work or employees within their division, admonish and encourage employees within their division concerning their performance and take corrective action where necessary. These responsibilities are recognized as the exercise of independent judgment on a consistent basis. *NLRB v. McCullough Environmental Services, Inc., supra*, at 941 (reassignments and ordering an employee to correct a mistake requires an exercise of independent judgment); *Schnuck Markets, Inc., v. NLRB, supra*, at 704 (assigning work to employees and admonishing employees for poor performance required the exercise of independent judgment and were not merely clerical or routine); U.D. 6-88, p.16, (discipline and direction of subordinates is the exercise of independent judgment); U.C. 4-90, p. 4-5 (correctional officer supervisor held to exercise independent judgment when assigning specific work duties, transferring employees within the division, counseling poorly performing employees and initiating disciplinary procedures).

All four of the employees exercise independent judgment as indicated not only by their own testimony, but also by the two Department head

supervisors, Cindy Sellers and Jay Bell. The unrefuted facts satisfy another statutory criteria rendering these individual supervisors.

**SECONDARY INDICATORS ALSO OVERWHELMINGLY  
SUPPORT THE EXCLUSION OF THESE FOUR SUPERVISORS**

The evidence presented in this case clearly reveals each of these four employees to be supervisors. There are also "secondary indicia" that these individuals can be considered supervisors. Some of these secondary criteria include: whether the employee is considered by other workers and by himself as a supervisor; whether he is held out to be a supervisor; whether he has a greater salary; whether he identifies with management and attends management meetings; whether the supervisor was considered as a person in authority; and whether he or she has attended supervisor training. All of these secondary indicators were proved and were uncontroverted by respondent. All of these secondary indicators have been approved in determining an employee as a supervisor and excluding them from a bargaining unit. *E and L Transport v. NLRB, supra*, at 1270; *Schnuck Markets, Inc. v. NLRB, supra*, at 706; *NLRB v. Chicago Metallic Corp., supra*, at 531; (attendance at supervisory seminars, training and instruction of others, reporting rule infractions, recognition as supervisor by subordinates, etc., among other criteria meet the secondary test for supervisory status).

Respondent suggests that in the case of the Sheriff's Department, a reorganization cannot lead to the promotion of long-term employees to supervisory positions. This is precisely what occurred in U.C. 4-90. In that case, there was substantial reorganization within the Women's Correctional Center then located in Warm Springs, Montana. The Board noted the authority and ability on the part of state government to

reorganize and provide supervisors during that reorganization in light of the actual responsibilities of those individuals. Similarly, in U.C. 5-85, the Board recognized the ability to reorganize and deemed this reorganization of the Montana Historical Society as being the catalyst for a long-term employee to be elevated to supervisory status even though she supervised only two employees. The Board looked at the *responsibilities* rather than the quantity of employees she supervised, ultimately finding she was indeed a supervisor. Respondent argues unconvincingly that these four employees cannot be supervisors because they lack ultimate authority to hire or fire, or because they must consult someone higher in the chain of command during an emergency or an atypical problem. However, see, e.g., *NLRB v. McCullough Environmental Services, Inc.*, *supra*, at 942; U.C. 9-88, pp. 4-6; U.D. 6-88, pp. 15-16. It is the relationship of the evaluation and disciplinary role to the whole organization that is important. U.C. 9-88, p. 8, citing *NLRB v. Beacon Light Christian Nursing Home*, *supra*, at 1076. Although Government supervisors are potentially subject to greater review than their private counterparts this does not eliminate them as supervisors because of their more restrictive authority. U.D. 6-88, p. 15; U.C. 9-88, p. 5.

Finally, BOPA affords great weight to the desires of the affected employees. All four of these employees indicate their unequivocal desire to be excluded from the Courthouse Bargaining Unit. Combining this desire with the other factors presented herein, these individuals are indeed supervisors and should be excluded as a matter of law from the Bargaining Unit. See, e.g., *Kaczynski v. Draper Printing*, *supra*, 848 F.Supp. at 1062, Note 1.

Here, a clear potential for a conflict of interest lies in these supervisors authority to influence and control substantially all personnel decisions that affect the employment of subordinates. These four individuals are indeed supervisors in light of the totality of all the organizational duties which they perform. They make effective recommendations concerning hiring, are essential to the interview process, and responsibly direct, discipline, evaluate and exercise independent judgment in the performance of these duties. They are not simply lead workers, but are essential to the supervision of support employees; therefore, it is appropriate that these supervisors be excluded from the bargaining unit.

#### **IV. CONCLUSIONS OF LAW**

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to the Montana Collective Bargaining for Public Employees Act, Section 39-31-101, et seq., MCA.

2. The Petition by Yellowstone County to exclude the four supervisory positions from the Courthouse Bargaining Unit is **GRANTED** pursuant to A.R.M. 24.26.630(5).

DATED this \_\_\_\_ day of October, 1997.

BOARD OF PERSONNEL APPEALS

By:

Gordon D. Bruce  
Hearing Officer

NOTICE: Pursuant to ARM 24.26.215, the above RECOMMENDED ORDER shall become the Final Order of this Board unless written exceptions are postmarked no later than \_\_\_\_\_. This time period includes the 20 days provided for in ARM 24.26.215, and the additional 3 days mandated by Rule 6(e), M.R.Civ.P., as service of this Order is by mail.



The notice of appeal shall consist of a written appeal of the decision of the hearing officer which sets forth the specific errors of the hearing officer and the issues to be raised on appeal. Notice of appeal must be mailed to:

Board of Personnel Appeals  
Department of Labor and Industry  
P.O. Box 6518  
Helena, MT 59604

\* \* \* \* \*

#### CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing documents were, this day served upon the following parties or such parties' attorneys of record by depositing the same in the U.S. Mail, postage prepaid, and addressed as follows:

Brent Brooks, Deputy County Attorney  
Yellowstone County Courthouse  
PO Box 35041  
Billings MT 59107

Carter N Picotte  
Montana Public Employees Assoc  
PO Box 5600  
Helena MT 59604

DATED this \_\_\_\_\_ day of October, 1997.